89-1359

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HILL RESOURCES, INC., PETITIONER

v.

CUESTA ENERGY CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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45pp

PRELIMINARY MATTER

QUESTION PRESENTED

1. Did the Circuit Court of Appeals err in determining that the provisions of Cuesta Energy Corporation's plan of reorganization are constitutional and within the scope of the Bankruptcy Court's subject matter jurisdiction in accordance with 11 U.S.C. §1141, 28 U.S.C. §157 and 28 U.S.C. §1334 as interpreted by *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982)?

LIST OF PARTIES

The Petitioner is Hill Resources, Inc.

The Respondent is Cuesta Energy Corporation.

The Petitioner has no parent company, affiliates or non wholley - owned subsidiaries.

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No._____

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Petitioner, Hill Resources, Inc., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 11, 1989.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is unreported, appears in Appendix A. The order of the United States District Court for the Western District of Oklahoma, which is unreported, appears in

Appendix B. The orders of the United States Bankruptcy Court for the Western District of Oklahoma, which are unreported, appear in Appendices C and D.

JURISDICTION

The order and judgment of the Court of Appeals was entered on September 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 11 United States Code §1141 is set forth in Appendix E.

STATEMENT OF THE CASE

1. Nature of the Controversy.

Cuesta Energy Corporation (Cuesta), the debtor in the bankruptcy proceeding and the Respondent here, is an Oklahoma Company formed in 1981 for the purpose of acquiring, developing and operating oil and gas wells. Hill Resources, Inc. (Hill), the Petitioner herein, is a working interest owner in three oil and gas wells operated by Cuesta. On November 21, 1984, an involuntary Chapter 11 Petition was filed against Cuesta in the United States Bankruptcy Court for the Western District of Oklahoma.

In accordance with the plan of reorganization, Cuesta's Trustee caused oil and gas revenues attributable to Hill's interest to be suspended at the first purchaser. Over Hill's objection, the bankruptcy court then ordered suspended production revenues attributable to Hill's interest to be paid to the trustee. These suspended funds were then offset against Hill's portion of the joint operating expenses on the Cuesta operated wells.

2. The Proceedings Below.

Hill appealed the bankruptcy court order approving the Plan of Reorganization of Cuesta Energy Corporation asserting that certain provisions of the plan are unconstitutional and in violation of 11 U.S.C. §1141, 28 U.S.C. §157 and 28 U.S.C. §1334 as interpreted by *Northern Pipeline v. Marathon*, 458 U.S. 50 (1982). On May 13, 1988, the District Court affirmed the lower decision finding that the Plan of Reorganization did not violate the Constitution or applicable provisions of the Bankruptcy Code. App.B.

On appeal, the Tenth Circuit affirmed the lower decisions "for the reasons set forth in the orders of the district court entered on May 12, 1988". App.A.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in conflict with the applicable decisions of this Court. The Appeals Court has refused to apply

the holding in the *Marathon* case. Because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required. In addition, there is a conflict in the lower court decisions interpreting *Marathon* in this factual setting.

I. THE DECISION BELOW IMPROPERLY AFFIRMED SUBJECT MATTER JURISDICTION IN THE BANKRUPTCY COURT OF A CLAIM INVOLVING A NON-CREDITOR OF THE BANKRUPT'S ESTATE.

In *Northern Pipeline Co. v. Marathon Pipeline Company*, 458 U.S. 50 (1982) this Court struck down the Bankruptcy Reform Act of 1978. Simplistically stated, this Court held that the Act's broad grant of jurisdiction to the Bankruptcy Court was in violation of Article III of the United States Constitution. Particularly repugnant to this Court was the fact that the Act conferred broad Article III powers on the Bankruptcy Court which is, by definition, an Article I Court.

The particular problem confronting this Court in *Marathon* was the bankruptcy court's attempt to exercise jurisdiction with respect to a debtor-creditor suit instituted by the appellant bankruptcy debtor against the appellee seeking redress for state created (i.e., breach of contract, breach of warranty, coercion, duress and misrepresentation) rights. The appellee objected to the jurisdiction of the bankruptcy court to hear this case in

light of the fact that said disputes may only be resolved by courts possessing Article III powers. The United States District Court agreed with the Appellee and dismissed the case for lack of subject matter jurisdiction, this Court affirmed.

Speaking for this Court, Mr. Justice Brennan held:

> Finally, the substantive legal rights at issue in the present action cannot be deemed 'public rights.' Appellants argue that a discharge in bankruptcy is indeed a 'public right,' similar to such congressionally created benefits as 'radio station licenses, pilot licenses, or certificates for common carriers' granted by administrative agencies. See Brief for United States 34. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights such as the right to recover contract damages that is at issue in this case. The former may well be a 'public right,' but the latter obviously is not. Appellant Northern's rights to recover contract damages to augment its estate is 'one of private rights, that is, of the liability of one individual to another under the law as defined.' *Crowell v. Benson*, 285 U.S. 22.

In his concurring opinion, Chief Justice Rehnquist, succinctly stated the issue at 458 U.S. 90 as follows:

> From the record before us, the lawsuit in which *Marathon* was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in this lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.

The issues present in this case are, in principle, the same issues which confronted the Court in *Marathon*. In this case, under the plan of reorganization, the trustee has seized funds which were held in suspense, attributable to working interests owners such as Hill. Hill's relationship with the debtor arises solely from state created rights, to wit, a contract known as a Joint Operating Agreement. Under the Joint Operating Agreement, the parties, designated as operator and non-operators, all own an interest in an oil and gas lease or leases as the case may be, and agree to pay their proportionate share of costs and expenses for the drilling and operation of an oil and gas wells. In return, the parties receive their proportionate share of revenues from oil and gas produced in the area covered by the Joint Operating Agreement.

Were it not for the Joint Operating Agreement(s), Hill and Cuesta would have no relationship whatsoever. Under the clear language of 11 U.S.C. §1141(a), which specifically lists those parties bound under a plan of reorganization, states:

> §1141. Effect of confirmation.
>
> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Hill shows the Court that it does not fall under any of the categories listed above, and cannot be bound by the Plan of Reorganization. Hill is not the debtor, not an entity issuing securities under the plan, not an entity acquiring property under the plan, not a creditor, not an equity security holder, and not a general partner impaired under the plan. Hill's only relation with the debtor is that Hill and the debtor both own interests in the same oil and gas wells.

Under the Plan of Reorganization, the Trustee for the debtor has seized funds attributable to Hill, and has applied those funds to Hill's debt to Cuesta. As previously mentioned, this alleged debt arises wholly and solely from the joint operating agreement, or stated another way, wholly and solely from the state created rights.

No matter how this seizure of funds is characterized by the Trustee, the seizure is nothing more than a blatant attempt by the trustee to collect accounts receivable which the Trustee deems due and owing. This is not only objectionable, it is unconstitutional.

The first objection is that the seizure of funds of a non-party to the bankruptcy proceedings, for alleged debts arising solely under a state law cause of action is unconstitutional in light of the Supreme Court's holding in *Marathon*, for the reason that this type of action is outside the scope of the bankruptcy courts subject matter jurisdiction. In addition to this somewhat significant flaw, the proposed seizure of funds attributable to Hill is constitutionally objectionable in that it deprives Hill of due process of law. Under the plan, the trustee has seized funds attributable to Hill to satisfy a debt allegedly due from Hill to Cuesta; without affording Hill a hearing, and without there ever having been a determination by a court of competent jurisdiction that, (a) Hill owes the debt, (b) the amount of the debt, and (c) the right of subrogation Hill will have, if any, against other working interest owners and Cuesta. In short, under the plan, the

trustee will be permitted to make a determination that Hill owes a debt, determine the amount of the debt, and effectuate seizure of funds to satisfy that debt. This conduct is not constitutionally permissible when done by a Judge, and is certainly impermissible when done by a bankruptcy trustee.

In *In Re Satelco, Inc.*, 58 B.R. 781 (BKRTCY N.D. Texas 1986) the Court addressed arguments similar to those raised by the appellant in the case at bar. The following passages from the opinion set forth the constitutionally mandated solution to the problem under the guidelines of *Marathon*.

> [T]o extent the proposition urged by the Debtor would mean that a Debtor may collect, by way of mandatory injunction, disputed claims to the monies, claims based strictly on state law which are unliquidated and contingent. Certainly such procedure could not be sanctioned outside bankruptcy and there is no reason why it should be sanctioned just because the entity seeking to collect disputed funds happens to be a Debtor under the Bankruptcy Code. To approve the proposition urged by the Debtor would be without a doubt, a gross violation of the most basic concepts of due process to which every Defendant is entitled, which involves at least the right to enjoy all the procedural safeguards otherwise available to all litigants in civil litigation.

* * *

There can be little question that this manifest intention of Congress to permit the bankruptcy court to exercise jurisdiction over litigation by the estate against non-creditor defendants in the course of liquidating a chose in action flies in the face of *Marathon*. The courts are thus placed squarely between the constitutionally permissible jurisdictional parameters for Article I courts prescribed by the Supreme Court, and the apparent liberality of the subsequent Congressional enactment. It is clear that where the latter runs afoul of the structures of the former, the former must control.

* * *

It is apparent that precisely the sort of problem facing the Court today was foreseen by the Senate, which included in its proposal for the 1984 Amendments a provision requiring remand to the state courts in any proceeding based solely upon state law. As Senator Hatch lamented after the Committee deleted that provision,

"Permitting federal bankruptcy courts to adjudicate state law claims would deprive state law claimants of the protections of state law merely because they happened to do business with or be injured by a party who later became bankrupt. Each state has

its own safeguards for the judicial process, such as evidentiary or jury trial rules. Permitting a federal bankruptcy court to assert jurisdiction over state law claims will deprive state law claimants of the protections of their own state laws."

* * *

For the reasons stated above, this Court holds that actions to collect accounts receivable based upon state law contract principles to not fall within the scope of turnover actions as contemplated by §542 and §157(b)(2)(E), absent a final judgment from a court of competent jurisdiction, a stipulation, or some other binding determination of liability. In addition, the Court holds that use of §157(b)(2)(O) as a jurisdictional basis for collection of accounts receivable is unconstitutional under *Marathon*. 58 B.R.781 at 785-789 (for an identical holding, see Matter of George Wolock Co. 49 B.R. 68).

The Petitioner believes that the quoted language provides not only the correct statement of the problems presented in situations similar to the case at bar, but also sets forth the correct solution to the problem.

In addition to the previous cases, an order issued by the United States Bankruptcy Court for the Northern District of Oklahoma on March 30, 1987 also interpreted

Marathon in a matter similar to *Satelco*. In *In re Northwest Exploration Company*, BK-82-1534, Adversary No. 86-0284, the court held that the forfeiture provisions of the plan were unconstitutional and that the trustee's attempts to seize funds attributable to non-creditor working interest owners were outside the scope of the bankruptcy court's jurisdiction in light of the holdings in *Marathon* and *Satelco*.

Hill is not a creditor of the bankrupt estate and in accordance with *Marathon*, *Satelco* and *Northwest*, is not subject to the jurisdiction of the bankruptcy court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HILL RESOURCES, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 88-1944
v.	)	(D.C. No. CIV-86-2531-T)
	)	(W.D. Oklahoma)
CUESTA ENERGY CORPORATION,	)	
	)	
Defendant-Appellee.	)	

ORDER AND JUDGMENT*

Submitted on the Briefs:

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Our review of the case leads us to the conclusion the district court did not err in affirming the judgment of the bankruptcy court. We affirm for the reasons set forth in the order of the district court entered on May 12, 1988. We have also considered whether the bankruptcy court erred in shortening the notice of the confirmation hearing. We have examined the record and have failed to find an objection filed in the bankruptcy court by the appellant that would serve to preserve this issue for appeal. Nonetheless, we would not reverse on this issue even if it were preserved. Given the extensive pre-hearing negotiations between the trustee and interested parties and the time between the submission of the original plan and the date of confirmation, we cannot say the bankruptcy court abused its discretion. Fed. R. Bankr. P. 9006(c).

AFFIRMED.

The mandate shall issue forthwith.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	District Court Appeal
	)	
CUESTA ENERGY	)	
CORPORATION,	)	CIV-86-2531-T
	)	BK-84-03466-B
Debtor.	)	(Chapter 11)

O R D E R

This is an appeal of the Bankruptcy Court's Order of September 30, 1986, approving the Plan of Reorganization of Cuesta Energy Corporation. The appellant, Hill Resources, Inc., alleges that certain provisions of the plan are unconstitutional and violative of various provisions of the Bankruptcy Code and further contends that it was not afforded due process of law at the hearing concerning the plan. The appellees, Cuesta Energy Corporation, Cuesta's Official Trade Creditors' Committee, and the Trustee of Cuesta, Earl Ingram, Jr., have responded, and the issues presented are ready for determination.

BACKGROUND

Cuesta Energy Corporation, the debtor in the bankruptcy proceeding and one of the appellees here, is an Oklahoma company formed in 1981 for the purpose

of acquiring, developing and operating oil and ga wells. On November 21, 1984, an involuntary Chapter 11 petition was filed against Cuesta in the Bankruptcy Court of this district. Subsequently, on August 16, 1985, the Court appointed Earl Ingram, Jr., as Trustee of Cuesta. On September 17, 1986, the Trustee and Cuesta's Official Trade Creditor's Committee filed a First Amended Disclosure Statement and a Joint Plan of Reorganization. The Bankruptcy Court approved the First Amended Disclosure Statement on the same day.

Pursuant to the Trustee's request, the Bankruptcy Court directed that creditors be allowed a shortened period of time to file acceptances or rejections of the Joint Plan or Reorganization. Among others, the appellant, Hill Resources, Inc. ("Hill"), a working interest owner in three of the oil and gas wells operated by Cuesta, objected to the plan. On September 29, 1986, the Bankruptcy Court held a hearing concerning the plan. On September 30, 1986, pursuant to the "cram down" provisions of 11 U.S.C. §1129(b), the Court confirmed the plan over the objections of several creditors.

APPELLEE'S MOTION TO DISMISS APPEAL

The appellees move to dismiss this appeal on grounds of mootness. They contend that since substantial implementation of Cuesta's reorganization plan has occurred, effective judicial relief cannot be afforded to Hill Resources, Inc., and the appeal should be dismissed.

In determining whether to dismiss an appeal of a confirmation of a reorganization plan on grounds of mootness, the Court must consider the particular provisions of the plan at issue and the effect of the plan's substantial implementation on the efficacy of any relief available to the appellant. *In re AOV Industries, Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986); *Matter of King Resources Co.*, 651 F.2d 1326, 1333 (10th Cir. 1980).

In the case at bar, although the appellees have submitted evidence that various provisions of the plan have been substantially implemented, they have not established that the appellant, Hill Resources, may not be afforded relief with regard to the particular provisions of the plan that it has challenged. In addition, given the disposition of the case that the Court finds proper, no prejudice or injustice will be suffered by the appellees as a result of consideration of the merits of the appeal. *See King Resources*, 651 F.2d at 1332. According, the appellees' Motion to Dismiss is denied, and the Court turns to the merits of the appeal.

CONSTITUTIONALITY OF THE PLAN UNDER MARATHON

Hill first argues that the provisions of the Plan of Reorganization that purport to bind it and other working interest owners are unconstitutional in light of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). There, the Supreme Court held that because the Bankruptcy Reform Act of 1978 vested in a non-Article III court the power to adjudicate, render final

judgment, and issue binding orders in a traditional contract action arising under state law, all without the consent of the parties, the Act was unconstitutional. Hill's argument raises a question of law subject to de novo review by this Court. *Matter of Dunes Casino Hotel*, 63 B.R. 939, 944 (D.N.J. 1986); *In re Cricker*, 46 B.R. 229, 230 (N.D. Ind. 1983).

Hill characterizes the Plan of Reorganization approved by the Bankruptcy Court as permitting the Trustee "to seize funds currently held in suspense, attributable to working interest owners such as Hill" in order to satisfy the debt owed to Cuesta by Hill and other working interest owners. The debt to which Hill refers is its obligation under the operating agreement it entered into with Cuesta to pay to Cuesta a proportionate share of the costs of drilling and operating the subject wells (referred to in the plan as "joint interest billings"). Thus, according to Hill, the plan authorizes the Trustee to initiate an action against it an other working interest owners to collect these joint interest billings as part of Cuesta's accounts receivable.

In support of this argument, Hill cites a number of cases that, applying Marathon, have held that a bankruptcy court may not adjudicate state law contract actions (including actions to collect accounts receivable) brought on behalf of the debtor against non-creditor defendants. In particular, the debtor relies on *In re Satelco, Inc.*, 58 B.R. 781 (Bankr. N.D. Tex. 1986). *See also In re Northwest Exploration Co.*, 71 B,R. 873 (Bankr.

N.D. Okla. 1987); *In re Pierce*, 44 B.R. 601 (D. Colo. 1984); *In re Atlas Automation, Inc.*, 42 B.R. 246 (Bankr. E.D. Mich. 1984).

Initially, the Court notes that a number of other courts have reached a different conclusion on this issue, holding that Marathon does not bar a trustee from initiating an action against a non-creditor defendant to collect the debtor's accounts receivable. *See, e.g., In re Bucyrus Grain Co.*, 56 B.R. 204 (Bankr. Kan. 1986); *In re Harry C. Partridge, Jr., and Sons, Inc.*, 48 B.R. 1006 (S.D.N.Y. 1985); *In re De Lorean Motor Co.*, 49 B.R. 900 (Bankr. E.D. Mich. 1985); *In Re Lyon Capital Group*, 46 B.,R. 850 (Bankr. S.D.N.Y. 1985). Neither party in the instant case has cited any decisions of the Supreme Court or the Tenth Circuit that constitute binding precedent on this question, and the Court has found none.

Nevertheless, assuming that the cases cited by Hill express the better view, the Court still does not find Hill's argument persuasive."

In the first place, the cases on which Hill relies concern actions brought against parties who were not creditors of the bankruptcy estate. The reasoning of Marathon does not bar such actions against creditors, for the Supreme Court expressly stated there that "the

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"Because it is not necessary to the disposition of this appeal, the Court neither adopts nor rejects the reasoning of the Satelco line of cases.

restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the right to recover contract damages that is at issue in this case." 458 U.S. at 71. Thus, the cases cited by Hill regarding the Bankruptcy Court's lack of jurisdiction are applicable only if Hill is not a creditor of Cuesta.

11 U.S.C. §101(9)(A) defines a creditor as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." In turn, a claim is defined as:

> [A] right to payment, whether or not such a right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. §101(4)(A). "Claim" thus encompasses "all legal obligations of the debtor, no matter how remote or contingent." *Matter of Thomas*, 12 B.R. 432, 433 (Bankr. S.D. Iowa 1981); *see Matter of Elsub Corporation*, 66 B.R. 189 (Bankr. D.N.J. 1986); *In re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986).

Here, Hill does not dispute that, as a working interest owner, it is entitled to a share of the revenue from the subject wells under the operating agreement that it entered into with Cuesta. According to the First Amended Disclosure Statement, before the bankruptcy petition was filed, Cuesta began suspending revenues

from the wells at the first purchaser; since the institution of bankruptcy, suspended production revenues have been paid to the Trustee and, more recently, placed in escrow. The First Amended Disclosure Statement further states that, as of September of 1986, over $130,000 in revenue attributable to Hill's working interest was held by the Trustee and in escrow. Exhibit 4 to the First Amended Disclosure Statement, a list of the administrative proof of claims, confirms that such revenues attributable to Hill are being held, for it lists Hill as one of Cuesta's creditors.

Hill's right to these suspended revenues satisfies the broad definition of a "claim" under the Bankruptcy Code. The Court thus concludes that, under the definition referred to above, Hill is a creditor of Cuesta. This fact distinguishes Hill from the defendants in the *Satelco* line of cases and renders the jurisdictional limitation set forth there inapplicable.

However, even if Hill were not a creditor of Cuesta, the record still does not establish that the Plan of Reorganization was unconstitutional under Marathon and that the Bankruptcy Court should not have confirmed it. *Satelco* and the other cases on which Hill relies all involve actions initiated on behalf of the debtor (mainly to collect the debtor's accounts receivable). Here, no such action has been filed. Further, upon examination of the provisions of the plan, the Court finds unpersuasive Hill's contention that the plan authorizes an action to

collect accounts receivable against Hill, even though no such action has yet been filed.

Specifically, section 5.15 of the plan provides that working interest owners who accept the plan will grant to the Trustee the right to apply suspended revenue against various accounts receivable. It further proves that, if a particular working interest owner does not accept the plan, "the joint operating agreement, as to that owner, is rejected and he shall have none of the rights specifically enumerated in this paragraph, unless otherwise provided by law. Any claim resulting from the rejection of the joint operating agreement shall be a Class 48 claim."

Hill acknowledges that it did not accept the plan and thus that the revenues attributable to its working interest were not subject to the setoff authorized by section 5.15.[***] However, it contends that the rejection of the operating agreement authorized by this section is just as unconstitutional under Marathon and the *Satelco* line of

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[***]On March 11, 1988, Hill filed with this Court an Objection to Motion in Aid of Implementation of the Plan. Hill reported that the Trustee had filed in the Bankruptcy Court a Motion in Aid of Implementation of the Plan in which he sought to set off $52,433.38 from the interest of Hill. In response to Hill's objection, the Trustee stated that he had agreed to withdraw the motion of which Hill complained insofar as it sought to offset revenue attributable to Hill. Accordingly, in light of this withdrawal, the Court will not consider the Trustee's Motion in Aid of Implementation of the Plan in determining the issues raised on this appeal.

cases as the initiation of an action to collect accounts receivable.

The Court does not agree. 11 U.S.C. §365 authorizes a bankruptcy trustee, upon court approval, to assume or reject an executory contract of the debtor. Since the operating agreements here at issue are ones on which, at the time of the filing of the bankruptcy petition, performance remained due both on the part of Cuesta and the working interest owners, the operating agreement wa an executory contract under 11 U.S.C. 365. *In re 2903 Wines and Spirits, Inc.*, 45 B.R. 1003 (S.D.N.Y. 1984); *In re Holland Enterprises*, 25 B.R. 301 (E.D.N.C. 1982). In *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 530 (1984), the Supreme Court stated that claims arising from the rejection of executory contracts "must be presented through the normal administrative process by which claims are estimated and classified" and concluded that recovery on such claims "may be obtained only through the administration of the claim in bankruptcy." Accordingly, the Court concludes that the provision of the plan rejecting the subject operating agreement as to nonconsenting working interest owners such as Hill is not unconstitutional under Marathon.

PLAN'S EXTENSION BEYOND "CORE PROCEEDINGS"

Hill next argues that, since certain provisions of Cuesta's Plan of Reorganization authorize the seizure of accounts receivable from Hill and other working interest

owners, these provisions are not "core proceedings" under 28 U.S.C. §157 and the Bankruptcy court thus did not have jurisdiction to hear them. This argument also raises legal questions subject to de novo review.

28 U.S.C. §157(b)(2) lists a number of matters deemed core proceedings, including "confirmations of plans," "matters concerning the administration of the estate," and "other matters concerning the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship." *See* 28 U.S.C. §157(b)(2)(A), (b)(2)(L), and (b)(2)(O). Thus, under 28 U.S.C. §157, the confirmation of Cuesta's Plan of Reorganization was a core proceeding over which the Bankruptcy Court had jurisdiction.

With regard to the particular provisions of the plan that, as Hill would have it, authorize the Trustee to seize accounts receivable, the Court has noted above that these provisions did not apply to Hill since it did not consent to the plan. The action that the plan did authorize as to Hill, the rejection of an executory contract, has been held by several courts to be a matter concerning the administration of the estate and thus a core proceeding. *See In re New York Deli, Ltd.*, 75 B.R. 797 (Bankr. D. Hawaii 1987); *Matter of Republic Oil Corporation*, 51 B.R. 355 (Bankr. W.D. Wis. 1985); *In re Turbowind, Inc.*, 42 B.R. 579 (Bankr. S.D. Cal. 1984). Moreover, since Hill was a creditor of Cuesta, the subject provisions of the plan concern the debtor-creditor relationship and the plan involves core matters for this reason as well.

Accordingly, the Court finds that the Plan of Reorganization did not exceed the scope of the Bankruptcy Court's jurisdiction and that the provisions of the plan concerning Hill were core proceedings.

DUE PROCESS

Hill next argues that the parties opposing Cuesta's Reorganization Plan were deprived of their right to due process of law because they were not afforded the right to a meaningful hearing. Again, the argument involves a legal question subject to de novo review.

Hill contends that although an evidentiary hearing was held, approval of the plan was a foregone conclusion and the hearing was merely a "statutorily required formality." In support of this argument, Hill points to the Bankruptcy Judge's denial of the motion to continue the hearing to allow various objecting parties more time to prepare for it, the Judge's directing the attorneys to cease pursuing certain lines of questioning at the confirmation hearing, and the Judge's instructing an attorney at the hearing that the attorney would not be allowed to conduct a redirect examination of a certain witness or to call another witness.

The requirement that the Bankruptcy Court hold a hearing concerning the confirmation of the Plan of Reorganization set forth in 11 U.S.C. §1128, which states:

(a) After notice, the court shall hold a hearing on confirmation of a plan;

(b) A party in interest may object to the confirmation of a plan.

11 U.S.C. §1128 does not specify the procedures that are to be followed at the confirmation hearing.

Generally, due process is a flexible concept and what it requires depends upon the particular facts at issue. *Matthew v. Eldridge*, 424 U.S. 319, 334 (1976). The minimal requirements of due process include notice and a meaningful opportunity to be heard before a right or interest is forfeited. *Johnson v. U.S. Department of Agriculture*, 734 F.2d 774, 782 (11th Cir. 1984). In determining what due process requires in particular situations, three factors are to be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of a liberty or property interest through the procedures used and the probable impact on the decision of any additional safeguards; and (3) the government's interest in providing these additional safeguards. *Matthew*, 424 U.S. at 335. With regard to a hearing on a plan of reorganization, the Tenth Circuit has stated that due process requires that creditors and all other interested parties be notified of "all vital steps in the [reorganization] proceeding so that they may have the opportunity to protect their interests." *Reliable Electric Co. v. Olson Construction Co.*, 726 F.2d 620, 623 (10th Cir. 1984).

In the instance case, from a review of the entire record, the Court finds that Hill was afforded the opportunity to protect its interest and thus was not deprived of its right to due process. Specifically, Hill was notified of the proposed plan, was presented with the Disclosure Statement and the Amended Disclosure Statement, and had the opportunity to review and comment on these documents and present its objections at the September 29, 1986, hearing. In light of these opportunities, the Court finds that the actions and decisions of the Bankruptcy Judge of which Hill now complains did not significantly increase the risk that an erroneous decision on the confirmation of the plan would be made. Further, neither the nature of Hill's interest nor any factors pertaining to the government's interest indicate that principles of due process required the Bankruptcy Court to conduct the confirmation hearing differently. Accordingly, the Court concludes that Hill was not deprived of its right to due process at the confirmation hearing.

PLAN'S COMPLIANCE WITH 11 U.S.C. §1129

Finally, Hill argues that the Bankruptcy Court erred in confirming the plan because the plan did not satisfy several of the requirements of 11 U.S.C. §1129. Whether a particular plan of reorganization complies with the provisions of 11 U.S.C. §1129 is a question of fact, and the determination of the Bankruptcy Court should not be reversed on appeal unless it is clearly erroneous. *In re Monnier Brothers*, 755 F.2d 1336, 1341 (8th Cir. 1985);

Matter of Pizza of Hawaii, Inc., 761 F.2d 1374, 1382 (9th Cir. 1985).

11 U.S.C. §1129 sets forth a number of prerequisites to the approval of a plan of confirmation. Hill maintains that the plan did not comply with either 11 U.S.C. §1129 (a)(7) or 11 U.S.C. §1129(a)(11). The former section requires that:

> With respect to each impaired class of claims or interests -
>
> (A) Each holder of a claim or interest of such class -
>
> (i) Has accepted the plan; or
>
> (ii) Will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date ....

11 U.S.C. §1129(a)(11) requires that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such

liquidation or reorganization is proposed in the plan.

Hill further argues that approval of the plan violated 11 U.S.C. §1129(b)(1). That section applies in instances in which not all classes of claims that are impaired by the plan have accepted it. It requires the plan "not to discriminate unfairly" and to be "fair and equitable" with regard to each class of claims or interest that is impaired under and has not accepted the plan.

In support of his argument that the plan did not comply with these sections of 11 U.S.C. §1129, Hill maintains that the proponent of the plan has the burden of proof that the plan complies with that section and that, in this instance, the proponents of Cuesta's plan presented no evidence of this compliance.

The Court agrees with Hill that the burden of proof on the question of whether the plan complies with 11 U.S.C. §1129 rests with the proponents of the plan. *See In re Trail's End Lodge, Inc.*, 54 B.R. 898, 908 (Bankr. D. Vt. 1985). However, Hill's characterization of the evidence presented in favor of the plan at the confirmation hearing of September 29, 1986, is misleading. The record indicates that evidence was presented at the confirmation as to the plan's compliance with section 1129. Specifically, the Trustee, Earl Ingram, Jr., testified that, in his opinion, the Plan of Reorganization complied with 11 U.S.C. §1129.

Moreover, in evaluating a Plan of Reorganization, the Bankruptcy Court is not limited to the evidence presented at the confirmation hearing but may consider evidence presented in earlier proceedings. *In re Acequia, Inc.*, 787 F.2d 1352, 1359 (9th Cir. 1986). In this instance, the Amended Disclosure Statement prepared by the Trustee and the Trade Creditors' Committee and approved by the Bankruptcy Court states that, in their opinion, the plan complies with the applicable sections of 11 U.S.C. §1129.

The Court concludes that it was proper for the Bankruptcy Court to consider statements made in the Amended Disclosure Statement in determining whether or not to confirm the Plan of Reorganization. Appellant, Hill, has failed to explain why, in light of the information contained in the Amended Disclosure Statement and the opinions advanced there, the Bankruptcy Court was mistaken in concluding that Cuesta's Plan of Reorganization satisfied the requirements of 11 U.S.C. §1129. Accordingly, the Court finds that the Bankruptcy Court's conclusion that the plan satisfied these requirement was not clearly erroneous and that its decision on this issue should be affirmed.

Accordingly, for the reasons stated above, the Court finds that Cuesta's Plan of Reorganization did not violate the Constitution or applicable provisions of the

Bankruptcy Code and that appellant, Hill, was not deprived of its right to due process. The decision of the Bankruptcy Court is affirmed.

IT IS SO ORDERED this 12th day of May, 1988.

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

IN RE: CUESTA ENERGY CORPORATION,	)	
	)	BK-84-03466
Debtor.	)	Chapter 11

ORDER ON MOTIONS FOR REHEARING AND RECONSIDERATION

On September 29, 1986, Judge Robert L. Berry of this court confirmed the "Joint Plan of Reorganization of the Trustee and the Official Trade Creditor's Committee" ("Plan") with respect to the debtor in this case. Subsequently Hill Resources, Inc. ("Hill") and Schrimsher Exploration, Ltd. ("Schrimsher") filed motions for reconsideration and for rehearing respectively, the implementation of the Plan having been stayed pursuant to an order entered by Judge Richard L. Bohanan of this court. While styled a motion to reconsider, such characterization by Hill is not controlling. Irrespective of how such motion is characterized, a post-judgment motion made within ten days of the entry of judgment which questions the correctness of a judgment is properly construed as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) made applicable in bankruptcy by Fed.R.Bankr.P. 9023. *See Venable v.*

Haislip, 721 F.2d 297 (10th Cir. 19834). Accordingly, the motion filed herein shall be treated as requesting relief pursuant to Rule 59(e).

After fully reviewing the motions, this court finds that no grounds are alleged by the movant to warrant the relief requested; movant merely reurge the positions respectively taken at the September 29, 1986 hearing.

Accordingly, the motions filed by Hill Resources, Inc. and Schrimsher Exploration, Ltd., deemed to be filed pursuant to Fed.R.Civ.P. 59(e), shall be and hereby are, as to each of the same, denied.

IT IS SO ORDERED THIS 4th day of November, 1986.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
CUESTA ENERGY	)	
CORPORATION,	)	No. BK-84-03466-b
	)	
Debtor.	)	

ORDER CONFIRMING
JOINT PLAN OF REORGANIZATION
OF THE TRUSTEE AND
THE TRADE CREDITORS' COMMITTEE
OF CUESTA ENERGY CORPORATION

The Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code filed by the Trustee, Earl Ingram, Jr. (Trustee) and the Trade Creditors' Committee, on September 17, 1986, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that:

1. The Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law; and

2. The proposed modifications to the Plan do not adversely change the treatment of the claim of any creditor or interest of any equity security holder who has not accepted in writing the modifications, and meets the requirements of §1122 and §1123 of the Code and are deemed to be accepted by all creditors and equity security holders who have accepted the Plan and should be allowed.

3. The provisions of Chapter 11 of the Code have been complied with; that the Plan has been proposed in good faith and not by any means forbidden by law; and

4. The Plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the Plan; and

5. All payments made or promised by the Trustee or by a person issuing securities or acquiring property under the Plan or by any other person for services or for costs and expenses in, or in connection with, the Plan and incident to the case, have been fully disclosed to the Court and are reasonable or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court; and

6. The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, of the Debtor, after confirmation of the Plan, have been fully disclosed, and the appointment of

such persons to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy; and

7. The identity of any insider that will be employed or retained by the Debtor and its compensation have been fully disclosed; and

8. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the Plan; and

9. The Objection to Hearing on Confirmation filed by Gary C. Pittenger, John Halloway and Deedee Hoops is overruled.

10. The objections to the Joint Plan of Reorganization filed by Kornfeld, Franklin & Phillips having been withdrawn pursuant to an agreement, the terms of which have been disclosed to and approved by the Court and the objections of Hill Resources, Inc., Kline and Kline, Omni Oil & Gas, Inc., Omni Oil and Gas Program 1980-1, Omni Petro-Investment Program 1981-A, RTD & Associates, II, Ray T. DeRieux, Gary Pittenger, David C. Hathaway, Helen B. and Joe A. Lane, Jack and Mavis Pittenger, John Halloway, John Callaway and Jack H. Pittenger, Jr., and Western Tank Trucks are overruled.

11. Upon consideration of the request of counsel for the Trustee, the Court finds that the Trustee shall continue to serve as Trustee until such time as a Creditors' Trustee and Board of Directors of Reorganized Cuesta are selected in accordance with the provisions of the Plan.

IT IS ORDERED that the Joint Plan of Reorganization of Cuesta Energy Corporation filed on September 17, 1986, and as modified on September 29, 1986, is confirmed and any objections to confirmation thereof are overruled.

IT IS FURTHER ORDERED that the Trustee shall continue to serve as Trustee until such time as a Creditors' Trustee and Board of Directors of Reorganized Cuesta are selected in accordance with the provisions of the Plan.

Dated this 30th day of September, 1986.

APPENDIX E

28 U.S.C. §1141

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.